UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

WILLIAM M. BURKE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-319-P-C***
	)	
CITY OF PORTLAND, et al.,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The defendants, Michael Porter, Eric Libby, Timothy L. Farris, and Michael J. Sauschuck, all police officers employed by the city of Portland, Maine; Michael Chitwood, chief of police for the city of Portland; and the city of Portland itself, move for summary judgment on all counts of the plaintiff's complaint, which alleges violations of his state and federal constitutional rights under 42 U.S.C. § 1983. Complaint (Docket No. 1) ¶¶ 32-46. I recommend that the court grant the motion in part and deny it in part.

I. Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved

favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The complaint alleges that four warrantless arrests of the plaintiff violated his right to freedom of expression under the First Amendment to the United States Constitution. Defendants' Statement of Material Facts in Support of Motion for Summary Judgment ("Defendants' SMF") (Docket No. 6) ¶ 1; Plaintiff's Opposing Statement of Material Fact ("Plaintiff's SMF") (Docket No. 12) ¶ 1. The alleged violations occurred on August 8, 1998, December 16, 1998, March 17, 1999 and April 21, 1999. *Id*. ¶ 3. The plaintiff identifies writing and reading poetry as his "vocation." *Id*. ¶ 2. He began reading his poetry on the streets of Portland on May 1, 1998. *Id*. ¶ 4.

A. First Incident

On August 8, 1998 the plaintiff read a long poem called *Howard Stolen* in the park at the corner of Middle and Temple Streets in Portland. *Id.* ¶ 5. He observed that there were a lot of people on the sidewalk of Exchange Street that night, so he went there and began reading the same poem. *Id.* He read his poem "loudly," "[w]ith all [his] soul." *Id.* He was approached by two police officers, who told him to "shut up" and "to go to the park if [he] wanted to read." *Id.* ¶ 6. The plaintiff did not respond to the police officers. *Id.* ¶ 7. After the officers asked the plaintiff to go to the park to read his poetry, they stood back against the shops for a few moments. *Id.* ¶ 9. At that time, a crowd of approximately 100 people had gathered around the plaintiff. *Id.* ¶¶ 9-10. The plaintiff, standing just outside 10 Exchange Street, continued to read the poem. *Id.* ¶ 10. After observing him for a few moments, the officers arrested the plaintiff. *Id.*

Between August 8 and December 16, 1998 the plaintiff read poetry in public in Portland approximately twelve times, without contact with any Portland police officers. *Id.* ¶ 11.

B. Second Incident

On December 16, 1998 the plaintiff, standing at 55 Exchange Street in Portland at approximately 4:30 p.m., was reading *A Midsummer Night's Dream* by William Shakespeare. *Id.* ¶ 12. That afternoon, he was reading one act of the play in a particular location, then moving approximately 25 feet up Exchange Street and reading the next act. *Id.* While he read the play, the plaintiff had a small easel-type sign set up and a skillet in front of him that he used to collect money from passersby. *Id.* ¶ 16. While he was reading Act III, a woman asked him to move on. *Id.* ¶ 13. While he was reading Act IV, the owner of the Wild Ginger shop asked him to move. *Id.* He replied that he would move after he finished Act IV, and he did so. *Id.* While he was reading Act V, the

final act, the plaintiff was standing about 20 to 25 feet above the Wild Ginger shop. *Id*. ¶¶ 12-13. Approximately one hour and 15 minutes after the first woman asked him to move on and one-half hour after the owner of the shop asked him to move along, police officers arrived. *Id*. ¶ 14.

Porter was dispatched to 55 Exchange Street. *Id*. ¶ 32. The plaintiff was reading when he arrived. *Id*. Porter spoke to the complainant, the owner of the store located at 55 Exchange Street, who reported to Porter than the plaintiff had been standing outside her door harassing her customers, that she asked the plaintiff to move, and that he had not responded to her request.[1] *Id*. ¶ 33. Porter then approached the plaintiff and told him that the police had received several complaints about his behavior. *Id*. ¶ 34. He told the plaintiff that he could read the poetry in the park, which was less than 100 feet away. *Id*. He told the plaintiff that he was obstructing a public way. *Id*. The plaintiff told Porter "I don't think I have to move" and continued to read. *Id*. ¶ 15. The plaintiff was then arrested for obstructing a public way. *Id*. ¶ 34.

Before this arrest, Porter had observed the plaintiff in the Old Port area of Portland approximately 50 times. Affidavit of Michael Porter (Docket No. 8) ¶ 15. On a few occasions, Porter received complaints about the plaintiff but took no action because, in his view, the plaintiff was not obstructing a public way. *Id.* Porter has observed many other public speakers but has never arrested any of them. *Id*. ¶ 16. When he receives a complaint about a public speaker who is not in a park, he observes the speaker and, if he determines that the speaker may be violating the statutes

[1] The plaintiff objects to the "admission" of any statement allegedly made by the shop owner "on the basis of hearsay if they [sic] are being offered for the truth of the matter asserted," and, to that extent, denies "all such hearsay statements contained in this paragraph." Plaintiff's SMF ¶ 33. He offers no evidentiary support for his denial, however, and, in any event, the statements are not offered for their truth in this instance but rather for the purpose of establishing probable cause, which is based on what was known to the police officer at the time of the arrest.

concerning disorderly conduct or obstructing public ways, he warns the speaker and requests that he or she move and/or lower the volume of the presentation. *Id*. Speakers other than the plaintiff have always complied with his requests. *Id*. [2]

Between December 16, 1998 and March 17, 1999 the plaintiff continued to read poetry in public in the city of Portland and had no contact with police officers. Defendants' SMF ¶ 17; Plaintiff's SMF ¶ 17.

C. Third Incident

On March 17, 1999 at around 3:50 p.m. the plaintiff was standing on a fence outside the Abacus store on Exchange Street in Portland reading *Othello* by William Shakespeare. *Id*. ¶¶ 18-19. He had his sign and his collection plate out. *Id*. ¶ 18. He was reading *Othello* in a louder voice than he had used when reading *A Midsummer Night's Dream*. *Id*. ¶ 20. Initially, no one was stopping to listen to him. *Id*. As the plaintiff was reading, defendant Libby in the transport van slowed down in the middle of Exchange Street and gestured to the plaintiff with his hand. *Id*. ¶¶ 21, 37. Libby subsequently pulled the van halfway off Exchange Street, leaned out of his window and told the plaintiff to get down. *Id*. ¶ 21. The plaintiff did not respond verbally to Libby's hand gesture or his verbal request. *Id*. The plaintiff claims that Libby then got out of the van, walked over to him and began pulling on his leg. *Id*. ¶ 22. The plaintiff asked "What's the charge?" *Id*. Libby said that there was no charge, but the plaintiff should get down. *Id*.

The plaintiff held on to a post and continued to read. *Id*. ¶ 23. By this time, a crowd had

[2] The plaintiff has not responded to these factual allegations in the defendants' SMF. Plaintiff's SMF ¶¶ 35-36. Because they are appropriately supported by the record references, they are therefore deemed admitted. Local Rule 56(e). It is not sufficient under the local rule to refuse to admit or deny an appropriately supported paragraph in a statement of material fact because the affidavit or other sworn testimony may be contradicted some time later in deposition or at trial.

stopped to watch what was happening. *Id*. The crowd eventually grew to 200-300 people. Affidavit of Eric Libby ("Libby Aff.") (Docket No. 10) ¶ 10.[3] Several minutes later, a second officer arrived, and both approached the plaintiff and again asked him to get down. Defendants' SMF ¶¶ 23-24; Plaintiff's SMF ¶¶ 23-24. The plaintiff did not respond. *Id*. ¶ 23. The officers then grabbed the plaintiff's legs and placed him on the ground. *Id*. The plaintiff started to scream "Violation." *Id*. The crowd "was screaming police brutality." *Id*. ¶ 24.

Before he went to the fence on Exchange Street, Libby was approached by a woman with two small children as he patrolled the Old Port. Libby Aff. ¶ 8. The woman told Libby that a man standing on a fence on Exchange Street was yelling profanity and causing offense to her and her children.[4] *Id*. Libby then drove down Exchange Street and observed the plaintiff standing on the fence and reciting poetry. *Id*. ¶ 9. Libby called for back-up while the plaintiff was chanting "violation" and the crowd was chanting "police brutality" and "police state." Defendants' SMF ¶ 39; Plaintiff's SMF ¶ 39. Libby states that the plaintiff kicked him in the left shoulder, at which point he arrested the plaintiff for assault and disorderly conduct. Libby Aff. ¶¶ 10-11.[5] The plaintiff

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[3] The plaintiff does not respond to this factual allegation. Plaintiff's SMF ¶ 38. It is appropriately supported by the cited affidavit and accordingly is deemed admitted. Local Rule 56(e).

[4] The plaintiff again makes a hearsay objection to Libby's report of the statement made to him by the woman about the plaintiff. Plaintiff's SMF ¶ 37. The fact that this objection is identical to that made in paragraph 33 of the plaintiff's statement of material facts is highlighted by its reference to "Officer Porter," who was not the police officer involved in the incident at issue in paragraph 37 of the parties' statements of material facts, although he was involved in the incident at issue in paragraph 33 of those documents. Again, because the woman's statement is not offered for its truth, the hearsay objection fails.

[5] The plaintiff "vehemently denies" this statement, Plaintiff's SMF ¶ 40, but his general citation to his own affidavit, in addition to being insufficient by failing to specify a paragraph of that document, does not support his denial. In fact, his affidavit supports the assertion. Affidavit of William Burke ("Plaintiff's Aff.") (Docket No. 13) ¶ 16.

denies that he kicked Libby. Plaintiff's Aff. ¶ 21.[6]

Between March 17 and April 21, 1999, the plaintiff continued to read poetry in public in Portland. Defendants' SMF ¶ 25; Plaintiff's SMF ¶ 25. Passing police officers would wave to him during this period, but he was not approached or arrested by any police officer while reading poetry. *Id.*

D. The Fourth Incident

On April 21, 1999 at around 2:30 p.m., the plaintiff was reading the poem *Howard Stolen* near 11 Exchange Street in Portland. *Id.* ¶ 26. A man told him to "go away" and to go back to where he had been reading earlier. *Id.* The plaintiff replied that he was almost done with the poem. *Id.* As the plaintiff was reading the last line of his poem, two police officers approached and stood on either side of him. *Id.* ¶ 28. They asked the plaintiff to show them some identification. *Id.* The plaintiff continued to read. *Id.* The officers then asked the plaintiff for his name and date of birth; he told them his name. *Id.* The officers began "poking" the plaintiff and took his wallet out of his pocket. *Id.*

Defendants Farris and Sauschuck received a call from police dispatch reporting a male yelling and being disorderly in the area of 11 Exchange Street. *Id.* ¶ 41. While en route to the scene, they also learned that the subject of the call could possibly be the subject of an active arrest warrant

[6] The defendants argue that the plaintiff's affidavit "should be disregarded" because it contradicts his deposition testimony on three specific points. Defendants' Reply Memorandum (Docket No. 20) at 5-6. While a statement in an affidavit that clearly contradicts prior deposition testimony without any explanation for the change should be disregarded for purposes of summary judgment, *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 5 (1st Cir. 1994), none of the three instances cited by the defendants involves a necessary contradiction. In addition, none of the facts on which the defendants contend the plaintiff has contradicted himself is necessary to my resolution of the motion for summary judgment.

from the York County Sheriff's Department on a charge of trafficking in scheduled drugs. *Id*. Defendant Farris believed that he needed to determine the plaintiff's year of birth in order to determine whether he was the individual named in the warrant. Affidavit of Timothy L. Farris ("Farris Aff.") (Docket No. 7) ¶ 4.[7] The officers found the plaintiff at the intersection of Exchange and Milk Streets, reading his poem. Defendants' SMF ¶ 42; Plaintiff's SMF ¶ 42; Deposition of William M. Burke ("Plaintiff's Dep.") at 46-47. They asked the plaintiff for his name and date of birth between five and seven times. Defendants' SMF ¶ 42; Plaintiff's SMF ¶ 42. The plaintiff turned away from the officers. Farris Aff. ¶ 5.

Farris explained to the plaintiff that the police had received a complaint about his conduct and also that they needed to confirm his name and date of birth. Defendants' SMF ¶ 43; Plaintiff's SMF ¶ 43. Farris states that the plaintiff gestured with his head, indicating his front pants pocket, and said "In my pocket." Farris Aff. ¶ 7. The plaintiff states that he "did not communicate to the officers in any manner that they had my permission to conduct a search of [his] person." Plaintiff's Aff. ¶ 28. Farris believed that the plaintiff did not want to interrupt his reading, Farris Aff. ¶ 8, so he attempted to check in the plaintiff's pocket for identification, *id.* ¶ 9; Defendants' SMF ¶ 44; Plaintiff's SMF ¶ 44. Sauschuck also attempted to check the plaintiff's pocket. Farris Aff. ¶ 9. Farris and Sauschuck state that the plaintiff then struck Sauschuck with his left hand. *Id*.; Affidavit of Michael J. Sauschuck (Docket No. 9) ¶ 6. The plaintiff denies that he assaulted the officers.

[7] The plaintiff denies this statement based on his own assessment finding it "incredible," because the police department was "well acquainted" with him, and other methods for determining his identity were available. Plaintiff's SMF ¶ 41; Plaintiff's Aff. ¶ 30. None of this information makes Farris's statement incorrect. The plaintiff also suggests that this statement "underscores an issue of law which does not belong in a recitation of 'facts.'" Plaintiff's SMF ¶ 41. To the contrary, Farris's belief at the time is very much a matter of fact.

Plaintiff's Aff. ¶ 32. The officers arrested the plaintiff for assault. Defendants' SMF ¶ 45.[8]

Both before and after April 21, 1999 Farris had driven by the plaintiff as he was yelling poetry in the Old Port. Defendant's SMF ¶ 46; Plaintiff's Aff. ¶ 46. Farris did not stop to investigate the plaintiff on these occasions because he had not received any complaint about the plaintiff's conduct. *Id*. Since April 21, 1999 the plaintiff has continued to read poetry in public in Portland on a weekly basis. *Id*. ¶ 29. On at least three occasions, the police arrived, observed the plaintiff, and left. *Id*.

E. Other Relevant Facts

Defendant Chitwood has been the chief of police for the city of Portland for approximately 12 years. *Id*. ¶ 48. He understands that an individual may not be detained by the police even momentarily without objectively reasonable grounds for doing so, and that refusal to listen or answer does not furnish grounds to detain a person. *Id*. ¶ 51. He understands that a police officer must have probable cause to believe that a person has committed a crime in order to arrest that person. *Id*. He expects that any Portland police officer would understand that a person's mere refusal to answer questions does not provide probable cause for an arrest. *Id*. His department does not give preferential treatment to complaints about public speakers that are made by Portland business owners. Deposition of Police Chief Michael Chitwood ("Chitwood Dep.") at 58.

Portland police officers receive training at the Police Academy and also receive annual development training consisting of approximately 24 hours of training on constitutional issues, laws of search and seizure, updates in the criminal code, and other training that the police department feels

[8] The plaintiff denies this statement in the defendants' statement of material facts, calling it "conclusory and self-serving," Plaintiff's SMF ¶ 45, yet in his affidavit, which he cites as the evidentiary basis for this denial, he makes the very same factual statement, Plaintiff's Aff. ¶ 25.

is appropriate. Defendants' SMF ¶ 49; Plaintiff's SMF ¶ 49. The police attorney is responsible for training officers about new developments in First Amendment law as it applies to arrests by police officers. *Id.* Portland police officers are trained in the Maine criminal statutes. *Id.* On October 28, 1998 the Portland police department disseminated a memorandum entitled Police/Citizen Contacts to all supervisory personnel, who were supposed to share this information with all officers. *Id.* ¶ 50. In January 1999 the defendant officers received special training related to police/citizen contact which addressed field stops and warrantless arrests. *Id.*

The Portland police department has a procedure for reviewing arrests which do not result in prosecution by the district attorney's office. *Id.* ¶ 54. If the investigation reveals that the arrest was improper, the officer involved may be subject to training or discipline. *Id.*

III. Discussion

The officer defendants seek summary judgment on Count I, the only count asserted against them, on the ground of qualified immunity. Chitwood seeks summary judgment on Count II, which is asserted solely against him, on the grounds of qualified immunity or failure to present evidence from which a jury could find that he was deliberately indifferent to violations of the First Amendment by Portland police officers. The City of Portland seeks summary judgment on Count III, the only count asserted against it, on the ground that the plaintiff has failed to generate evidence of constitutionally inadequate training or supervision of its police officers. Defendants' Motion for Summary Judgment ("Motion") (Docket No. 5) at 1-2.[9]

[9] The city also seeks dismissal of the claim for punitive damages asserted against it by the plaintiff. Motion at 2, 17. The plaintiff does not respond to this portion of the motion, thereby waiving any objection. Local Rule 7(b). The city correctly cites *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981), in support of its argument that a governmental entity is not liable for (continued...)

A. Qualified Immunity

Section 1983 of Title 42 of the United States Code provides a private cause of action against any person "who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Section 1983 is not itself the source of any substantive rights; it merely provides a method for vindicating federal rights conferred elsewhere. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Here, the plaintiff has identified the First Amendment as the source of the rights of which he alleges he was deprived on each of the four occasions detailed in the defendants' statement of material facts.

"[G]overnment officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "[I]n the light of pre-existing law the unlawfulness [of the conduct at issue] must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

> There are two prongs to the qualified immunity analysis. First, was the constitutional right in question clearly established at the time of the alleged violation? That is a question of law for the court. Second, would a reasonable, similarly situated official understand that the challenged conduct violated that established right?

Swain v. Spinney, 117 F.3d 1, 9 (1st Cir. 1997) (citations omitted). The qualified immunity analysis allows for "the inevitable reality that law enforcement officials will in some cases reasonably but mistakenly conclude that their conduct is constitutional and that those officials — like other officials

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[9](...continued)
punitive damages on claims brought under 42 U.S.C. § 1983. Accordingly, the claim asserted in Count III for punitive damages, Complaint at 7, should be dismissed.

who act in ways they reasonably believe to be lawful — should not be held personally liable." *Hegarty v. Somerset County*, 53 F.3d 1367, 1373 (1st Cir. 1995). "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that the [challenged conduct was lawful]; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). "It is not enough for the constitutional right to be 'clearly established' at a highly abstract level; what matters is whether in the circumstances faced by the official, he should reasonably have understood that his conduct violated clearly established law." *Ringuette v. City of Fall River*, 146 F.3d 1, 5 (1st Cir. 1998).

The question whether a police officer's actions, viewed objectively, were unreasonable under the circumstances "while requiring a legal determination, is highly fact specific, and may not be resolved on a motion for summary judgment when material facts are substantially in dispute." *Swain*, 117 F.3d at 9.

The plaintiff relies solely on the First Amendment as the source of the constitutional rights at issue in his opposition to the defendants' motion. Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 11) at 1-12. He argues that "it can hardly be contested that citizens of this country have a constitutional right to express themselves in public places, or that city sidewalks qualify as public places." *Id*. at 2. Even so, the qualified immunity analysis does not end there. Even in "quintessential public forums," the state "may . . . enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open amply alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460

U.S. 37, 45 (1983). *See also Cox v. Louisiana*, 379 U.S. 536, 554 (1965) ("The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order . . . . The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order.")

Nothing in the summary judgment record indicates that the plaintiff was selectively arrested for the content of his speech while speakers reciting the works of other poets or prose authors went unmolested. Accordingly, the four arrests at issue here must be analyzed in the context of the Fourth Amendment. *United States v. Rubio*, 727 F.2d 786, 791 (9th Cir. 1984) (protections afforded by Fourth Amendment come into play when activity protected by the First Amendment is subject of criminal investigation). *See also Redd v. City of Enterprise*, 140 F.3d 1378, 1380-81, 1383 (11th Cir. 1998) (traveling preacher arrested while speaking loudly on sidewalk at intersection; qualified immunity analysis based on question whether officers had probable cause to arrest).

If the officers had probable cause to arrest the plaintiff in each instance, there is no cause of action under section 1983. *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 253-54 (1st Cir. 1996). "Probable cause to arrest exists if, at the moment of the arrest, the facts and circumstances within the relevant actors' knowledge and of which they had reasonably reliable information were adequate to warrant a prudent person in believing that the object of his suspicions had perpetrated or was poised to perpetrate an offense." *Id*. at 254. "[T]he quantity and quality of proof necessary to ground a showing of probable cause is not the same as the quantity and quality of proof necessary to convict." *Id.* at 255. "Police are afforded immunity so long as the presence of probable cause is

at least arguable." *Fletcher v. Town of Clinton*, 196 F.3d 41, 53 (1st Cir. 1999) (internal quotation marks and citation omitted).

1. The August 8, 1998 Incident.

In contrast to their approach to the other three incidents at issue in this proceeding, the defendants provide no factual allegations in their statement of material facts directed to the existence of probable cause to arrest the plaintiff on August 8, 1998. Indeed, they do not even specify the charge upon which he was arrested or identify the defendant who arrested him. Although they include the factual material summarized in section II(A) of this recommended decision in their statement of material facts, the defendants inexplicably fail to refer to this incident at all in their motion, which clearly seeks summary judgment on Count I in its entirety. The complaint alleges that the plaintiff "has been arrested by the Portland Police for reading poetry in public" on "four separate occasions in the past two years." Complaint (Docket No. 1) ¶ 22. While the plaintiff does not discuss the August 8, 1998 incident in his opposition, that document is constructed to respond to the defendants' arguments and cannot be construed as a waiver of any claims based on that incident.

Accordingly, in the absence of sufficient evidence properly included in the summary judgment record to enable the court to evaluate a claim of qualified immunity with respect to the August 8, 1998 incident, the defendants' motion for summary judgment as to any claims based on that incident must be denied. The defendants of course may present such evidence at trial.

2. The December 16, 1998 Incident.

On December 16, 1998 the plaintiff was arrested by defendant Porter on a charge of obstructing a public way. The applicable statute provides:

> **1.** A person is guilty of obstructing public ways if he unreasonably

> obstructs the free passage of foot or vehicular traffic on any public way, and refuses to cease or remove the obstruction upon a lawful order to do so given him by a law enforcement officer.
>
> **2.** As used in this section, "public way" means any public highway or sidewalk, private way laid out under authority of statute, way dedicated to public use, way upon which the public has a right of access or has access as invitees or licensees, or way under the control of park commissioners or a body having like powers.
>
> **3.** Obstructing public ways is a Class E crime.

17-A M.R.S.A. § 505. The defendants contend that Porter had arguable probable cause to arrest the plaintiff on this charge because the owner of the Wild Ginger store reported to him that the plaintiff was harassing her customers, he observed the plaintiff reading poetry very loudly outside the store, he informed the plaintiff that he was obstructing a public way, and the plaintiff refused his order to move to the nearby park. Motion at 6. The problem for the defendants here is that none of the evidence they present shows that the plaintiff was obstructing the free passage of foot traffic on the sidewalk while he was reading Shakespeare, with a small sign beside him and a skillet in front of him.

I cannot conclude as a matter of law, based on the showing made, that Porter had probable cause to arrest the plaintiff for obstructing a public way on December 16, 1998. I cannot conclude that the facts and circumstances shown by the summary judgment record to have been known by Porter were necessarily adequate to warrant a prudent person in concluding that the plaintiff had obstructed a public way or was about to do so. When the issue is phrased in the terms of *Ringuette* — whether Porter should reasonably had understood that his conduct violated clearly established law — the question is somewhat closer, but the result is the same. On the summary judgment record, I cannot conclude that no reasonably competent officer would have concluded that he had probable

cause to arrest the plaintiff for obstructing a public way, nor can I draw the contrary conclusion. Therefore, summary judgment is not appropriate on the basis of qualified immunity with respect to the December 16, 1998 arrest. Again, this result does not mean that the defendants cannot pursue this defense at trial.

3. The March 17, 1999 Incident.

The plaintiff was arrested by defendant Libby on March 17, 199 for assault and disorderly conduct. The relevant Maine statutes provide, in pertinent part:

> **1.** A person is guilty of assault if he intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another.
>
> **2.** Assault is a Class D crime, except in instances of bodily injury to another who had not attained his 6th birthday, provided that the actor has attained his 18th birthday, in which case, it is a Class C crime.

17-A M.R.S.A. § 207.

> A person is guilty of disorderly conduct if:
>
> **1**. In a public place, he intentionally or recklessly causes annoyance to others by intentionally:
>
> **A.** Making loud and unreasonable noises;
>
> * * *
>
> **2.** In a public or private place, he knowingly accosts, insults, taunts or challenges any person with offensive, derisive or annoying words, or by gestures or other physical conduct, which would in fact have a direct tendency to cause a violent response by an ordinary person in the situation of the person so accosted, insulted, taunted or challenged;
>
> * * *
>
> **5.** As used in this section:
>
> **A.** "Public place" means a place to which the public at large or a substantial group has access, included but not limited to
>
> **(1)** public ways as defined in section 505 . . . .
>
> **6.** Disorderly conduct is a Class E crime.

17-A M.R.S.A. § 501.

The plaintiff correctly points out that the evidence concerning probable cause to arrest him on the charge of assault is in dispute. The only evidence of an assault is Libby's sworn statement that the plaintiff kicked him; the plaintiff swears that he did not kick Libby. If the plaintiff in fact did not kick Libby, the officer could not have reasonably believed that the plaintiff had assaulted him. A police officer may not create probable cause to arrest in the summary judgment context based solely on his own factual testimony when that testimony is directly contradicted by that of another witness; such disputes require a determination of credibility that can only be made at trial.

However, the same is not true of the arrest for disorderly conduct. At the time of the arrest, Libby had been told by a woman with small children that the plaintiff was yelling profanity and had caused offense to her. He had observed the plaintiff reading Shakespeare at a volume Libby considered to be loud[10] while standing on a fence next to a store and repeatedly screaming "What's the charge?" after Libby asked him to get down from the fence. He had observed a large crowd gathering at the scene, chanting "police brutality" and "police state" while the plaintiff chanted "violation." These facts, regardless of the question whether the woman had actually heard the plaintiff yelling profanity and had been offended, provided Libby with probable cause to arrest the plaintiff for disorderly conduct under *Roche* and *Fletcher*. A prudent person in Libby's position would have been warranted in believing that the plaintiff had perpetrated the offense of disorderly conduct by causing annoyance to others by making loud and unreasonable noises. Accordingly,

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[10] Libby states that the plaintiff was reciting "loudly." Libby Aff. ¶ 9. The plaintiff states, in conclusory fashion, "I was not . . . making loud and unreasonable noises; I was reading a poem." Plaintiff's Aff. ¶ 17. At his deposition, the plaintiff testified that he was reading *Othello* "[l]ouder than [he] was reading *Mid* [sic] *Summer Night's Dream*." Plaintiff's Dep. at 36. The plaintiff does not dispute that he repeatedly screamed "What's the charge?" after Libby approached him. Libby Aff. ¶ 10.

Libby's conduct is protected by qualified immunity and the defendants are entitled to summary judgment on any claims arising out of the March 17, 1999 incident.

4. The April 21, 1999 Incident.

The plaintiff was arrested by defendants Farris and Sauschuck on April 21, 1999 for assault. The charge arises out of the officers' testimony that the plaintiff struck Sauschuck with his left hand. Here, the plaintiff states that he "did not . . . assault the police officers," Plaintiff's Aff. ¶ 32, which does not necessarily contradict the officers' testimony that he struck Sauschuck. The plaintiff's statement could be either a legal conclusion or a colloquial use of the word "assault," in which a single touching may not be considered an "assault." In any event, the court in considering the motion for summary judgment must construe the plaintiff's sworn assertion on this point in the light most favorable to him and, drawing a reasonable inference, the statement could be construed as a denial of the officers' statements. Accordingly, a disputed issue of material fact exists with respect to the qualified immunity analysis of this incident.

It is important to note that the officers' conduct before the arrest does not provide the basis for a section 1983 claim. The officers were entitled, based on the information provided to them concerning the warrant for the arrest of an individual with the plaintiff's name, to ask the plaintiff his date of birth and for documentation showing that date. *See generally United States v. Acosta-Colon*, 157 F.3d 9, 14 (1st Cir. 1998) (discussing legal standard for "*Terry* stop," under *Terry v. Ohio*, 392 U.S. 1 (1968)); *Rivera v. Murphy*, 979 F.2d 259, 264 (1st Cir. 1992) (same; standard lower than that for arrest). The question whether they had probable cause to arrest the plaintiff for assault, however, cannot be resolved under the circumstances without an evaluation of the credibility of the officers and the plaintiff and must therefore await trial. *See McLain v. Milligan*, 847 F.Supp.

970, 976-99 (D.Me. 1994) (denying summary judgment on qualified immunity defense where application depends on which version of disputed facts is adopted).

The defendants are not entitled to summary judgment on the basis of qualified immunity with respect to the April 21, 1999 incident but may pursue this defense at trial.

B. Count II

Defendant Chitwood seeks summary judgment on Count II, which alleges supervisory liability for the four incidents. A supervisor "may be liable under section 1983 if he formulates a policy or engages in a practice that leads to a civil rights violation committed by another." *Camilo-Robles v. Hoyos*, 151 F.3d 1, 6-7 (1st Cir. 1998). Supervisory liability does not require a showing that the supervisor had actual knowledge of the offending behavior; he "may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness." *Id*. (internal quotation marks and citation omitted). If the plaintiff relies on deliberate indifference, he must show "(1) a grave risk of harm, (2) the defendant's actual or constructive knowledge of that risk, and (3) his failure to take easily available measures to address the risk." *Id*. The plaintiff must "affirmatively connect the supervisor's conduct to the subordinate's violative act." *Id*. (internal quotation marks and citation omitted).

The plaintiff offers as evidence on this count only a statement made by Chitwood after the events in question here,[11] as recounted in a newspaper article:

> Chitwood says teens are asked to move on only when they congregate and block entrances to business or create disturbances.
>
> "A couple of years ago (the) business community said, 'Hey, all

[11] The plaintiff relies on several other statements made by Chitwood at his deposition, Plaintiff's Opposition at 10, but none of that material appears in his statement of material facts, and therefore none of it may be considered by the court.

> these kids sitting in the sidewalks, not letting people pass, having pit bulls out there, intimidating people, fighting people, is not good for business.' And you know what, it wasn't," Chitwood says.
>
> "They [the businesses] pay the taxes; they pay the bill. And we responded. We said that 'if you don't have any business here, we're not going to allow you to congregate, we're not going to allow you to block the community.'"

Chitwood Dep. at 26-27 & Exh. 1. This statement, which does not appear to be related to the circumstances of any of the plaintiff's arrests, is insufficient as a matter of law to establish that Chitwood encouraged, condoned, acquiesced in, or was deliberately indifferent to, the behavior of the defendant officers, assuming *arguendo* that he had notice of behavior that was likely to result in the violation of the constitutional rights of Portland citizens. *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 93 (1st Cir. 1994). It does not begin to approach the level of evidence necessary to establish reckless or callous indifference to the First or Fourth Amendment rights of Portland citizens. *See, e.g., Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 564-66 (1st Cir. 1989) (discussing evidence sufficient to show supervisor's reckless or callous indifference). It is not evidence of a policy or practice applicable to the plaintiff's circumstances or, for all that appears, at the time of the plaintiff's arrests. The plaintiff offers no evidence affirmatively linking any conduct by Chitwood to his arrests.

For all of these reasons, Chitwood is entitled to summary judgment on Count II.

C. Count III

The city of Portland seeks summary judgment on Count III. A municipality is not subject to *respondeat superior* liability under section 1983. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978). In order to establish the city's liability, the plaintiff must demonstrate that each challenged action "implements or executes a policy statement, ordinance, regulation, or decision

officially adopted and promulgated by the municipality's officers or is pursuant to governmental custom even though such a custom has not received formal approval through the body's official decisionmaking channels." *Fletcher*, 196 F.3d at 55 (quoting *Monell*; internal punctuation omitted). He must "show a direct causal link between the municipal action and the deprivation of federal rights." *Id*.

The plaintiff relies solely upon Chitwood's "policy or custom" to establish the city's liability. Plaintiff's Opposition at 12-13. He contends that Chitwood's policies must be "deemed to be those of the City of Portland," because Chitwood "is a policy-maker for the municipality." *Id*. at 13. He cites in support of this statement *Kinan v. City of Brockton*, 876 F.2d 1029, 1035 (1st Cir. 1989) ("A municipality can be held liable if its police chief is a policymaker and acquiesces in a police custom or policy as to which he has actual or constructive knowledge."). The plaintiff's failure to provide evidence that Chitwood has any supervisory liability in this case is accordingly fatal to his claim in Count III as well. Even if that were not the case, the plaintiff has not produced any evidence that Chitwood may in fact be a policymaker for the city. He contends that he may rely upon the allegation in his complaint to this effect because the defendant city has not produced any evidence to the contrary, and it is the city's burden on its motion "to disprove the contention that Chief Chitwood is a policy-maker for the City of Portland." Plaintiff's Opposition at 13. This argument misperceives the nature of summary judgment. If the plaintiff intends to rely on Chitwood's alleged status as a policymaker in order to avoid the entry of summary judgment, an issue not specifically raised in the defendants' motion, Motion at 15-17, he may not rely on the unsworn allegation in his complaint, *American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 125 (1st Cir. 1998), and he may not "manufacture" a disputed issue of material fact by negative implication, *Collier v. City of*

Chicopee, 158 F.3d 601, 604 (1st Cir. 1998). "[T]hat is to say, a party opposing summary judgment cannot rely on an absence of competent evidence, but must affirmatively point to specific facts that demonstrate the existence of an authentic dispute." *Id*. (internal quotation marks and citation omitted).

The plaintiff has not provided evidence in the summary judgment record sufficient to allow a jury to consider his claim against the city of Portland, which accordingly is entitled to summary judgment on Count III.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **GRANTED** as to any claims in Count I arising out of the plaintiff's arrest on March 17, 1999 and as to Counts II and III and otherwise **DENIED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 5th day of May, 2000.

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David M. Cohen
United States Magistrate Judge

BURKE v. PORTER, OFFICER, et al Filed: 10/12/99 Assigned to: JUDGE GENE CARTER Jury

demand: Both Demand: $0,000 Nature of Suit: 440 Lead Docket: None Jurisdiction: Federal Question Dkt# in other court: None Cause: 42:1983 Civil Rights Act WILLIAM M BURKE MICHAEL J. WAXMAN, ESQ. plaintiff [COR LD NTC] 377 FORE STREET PO BOX 375 PORTLAND, ME 04104-7410 772-9558 v. PORTER, OFFICER MARK E. DUNLAP defendant 774-7000 [COR LD NTC] NORMAN, HANSON & DETROY 415 CONGRESS STREET P. O. BOX 4600 DTS PORTLAND, ME 04112 774-7000